MAXISEGAR SDN BHD

v.

SILVER CONCEPT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: W-02-178-2001]
28 JUNE 2005

CONTRACT: *Frustration - Correct test - Sale and purchase of land - Economic slowdown - Failure to obtain bank loans to complete purchase thereof - Whether constituting fundamental or radical change in circumstances - Whether agreement frustrated - Contracts Act 1950, s. 57*

CIVIL PROCEDURE: *Appeal - Adducing of fresh evidence - Conditions and prerequisites - Compliance - Absence of reasonable explanation - Evidence could have been obtained with reasonable diligence - Whether requirements not fulfilled*

This was an appeal against the decision of the learned judge allowing the respondent's claim for breach of contract, and ruling that: (i) the appellant was liable for breach when it failed to raise enough funds to complete the purchase of the subject land from the respondent; (ii) the doctrine of frustration could not be invoked on the mere ground of such failure to raise funds; (iii) the issuance of a directive by Bank Negara Malaysia that discouraged lending by banks to the property sector, which allegedly resulted in the appellant's failure to obtain loans to complete the purchase of the land ('the BNM ruling') – was not a fundamental supervening circumstance that would make the performance of the contract radically different from that which the parties had originally undertaken; and (iv) the respondent was, by reason of the breach, entitled to forfeit not only the first instalment of the purchase price paid by the appellant but also the agreed liquidated damages spelt out in cl. 10.1 of the agreement. Principally, the appellant's arguments before the Court of Appeal were two-fold, namely: (i) that the Bank Negara ruling was a supervening event which it had no control of and which resulted in the agreement to become frustrated and void pursuant to s. 57 of the Contracts Act 1950; and (ii) that it was improper of the appellant to have pursued a claim for specific performance while at the same time seeking damages for breach of contract. These points apart, the appellant had also sought leave of

the learned judges to adduce fresh evidence, *viz.* the respondent's Directors' Report and Audited Accounts for the years 1997 and 1998 ('Company Accounts'), which the appellant seemed to have 'missed' at the trial below.

Held (dismissing the appeal)
Per Abdul Kadir Sulaiman JCA delivering the judgment of the court:

[1] To justify the reception of fresh evidence, three conditions must be fulfilled, namely: (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case; and (iii) the evidence must be such as is presumably to be apparently credible, though it need not be incontrovertible. (pp 243 h & 244 a)

[2] There was no merit in the appellant's application to adduce fresh evidence herein. The appellant's supporting affidavits did not explain why the evidence could not have been made available in the court below or could not have been obtained by the exercise of reasonable diligence. The Company Accounts were in the public domain. Clearly, the documents could have been made available for the trial if the appellant had just conducted a simple search at the Registry of Companies. (pp 244 c-h & 245 a)

[3] The learned judge had correctly guided himself on the law of frustration and came to a correct finding. There was no error in his finding that the contract herein was not frustrated. (p 250 f)

[3a] Even if we were wrong on this issue, the fact remains that frustration, if any, was self-induced by the appellant. On the facts, there was no supervening event at all. The appellant had refused to comply with the Bank Negara guidelines on lending to the property sector and in the circumstances the banks were unable to grant the loan. This was a deliberate act of non-compliance by the appellant. (pp 251 b & 252 b)

[4] A party's claim for specific performance of the agreement together with a further or alternative claim for damages for breach of contract is a perfectly usual claim. There is therefore no inconsistency in the respondent maintaining a claim for specific performance and also seeking damages for breach of the contract *in lieu* of specific performance. (p 254 a-e)

[5] The trial judge had correctly awarded the agreed liquidated damages under cl. 10.1 of the agreement. The appellant had not shown that the clause is a penalty clause, or that the agreed liquidated damages is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered. In any case, the parties had freely bargained and agreed to the formula of damages stipulated in the clause. (p 258 b-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim yang membenarkan tuntutan responden bagi kemungkiran kontrak, dan memutuskan bahawa: (i) perayu telah mungkir apabila ia gagal mengumpul dana yang mencukupi bagi menyempurnakan pembelian tanah yang berkenaan dari responden; (ii) kegagalan mengumpul dana tersebut tidak boleh membangkitkan doktrin kekecewaan; (iii) pengeluaran arahan oleh Bank Negara Malaysia yang tidak menggalakkan pemberian pinjaman kepada sektor hartanah, yang dikatakan perayu sebagai penyebab mengapa ia gagal mendapat pinjaman untuk menyempurnakan pembelian tanah ('arahan BNM') – bukanlah peristiwa mencelah yang penting sehingga menjadikan pelaksanaan kontrak sesuatu yang amat berbeza dari apa yang asalnya dipersetujui oleh pihak-pihak; (iv) akibat kemungkiran perayu, responden bukan sahaja berhak untuk merampas ansuran pertama yang dibayar oleh perayu tetapi juga gantirugi jumlah tertentu yang dipersetujui di bawah per. 10.1 perjanjian. Hujah perayu di hadapan Mahkamah Rayuan pada intinya adalah bercabang dua, iaitu: (i) bahawa arahan Bank Negara adalah suatu peristiwa mencelah yang di luar kawalannya, sekaligus menyebabkan kontrak menjadi kecewa dan batal di bawah s. 57 Akta Kontrak 1950; dan (ii) bahawa adalah tidak wajar bagi responden untuk menuntut pelaksanaan spesifik dan pada masa yang sama memohon gantirugi kerana kemungkiran kontrak. Di samping itu, perayu juga memohon izin yang arif hakim-hakim bagi mengemukakan keterangan baru, iaitu Akaun Berodit dan Laporan Pengarah responden bagi tahun-tahun 1997 dan 1998 ('Akaun Syarikat'), yang kelihatan 'ditinggal' oleh perayu semasa perbicaraan di bawah.

Diputuskan (menolak rayuan)
Oleh Abdul Kadir Sulaiman HMR menyampaikan penghakiman mahkamah:

[1] Bagi mewajarkan penerimaan keterangan baru, tiga syarat perlu dipenuhi, iaitu: (i) hendaklah dibuktikan bahawa walaupun dengan usaha yang munasabah keterangan tersebut masih tidak mampu diperolehi untuk digunakan di perbicaraan; (ii) keterangan mestilah sebegitu rupa bahawa,

jika dikemukakan, ia berkemungkinan akan mempengaruhi keputusan kes; (iii) keterangan hendaklah sebegitu rupa bahawa ia adalah boleh dipercayai, walaupun tidak perlu bebas sepenuhnya dari keraguan.

[2] Tiada merit dalam permohonan perayu untuk mengemukakan keterangan baru di sini. Afidavit-afidavit menyokong perayu tidak menjelaskan kenapa keterangan tidak boleh dikemukakan di mahkamah di bawah atau tidak boleh diperolehi melalui usaha-usaha yang munasabah. Akaun Syarikat berada di dalam simpanan awam. Jelas bahawa, untuk memperolehi dokumen-dokumen berkenaan untuk dikemukakan pada perbicaraan, perayu hanya perlu membuat carian yang mudah di Pejabat Pendaftar Syarikat.

[3] Yang arif hakim telah mengarahkan dirinya dengan betul berkaitan undang-undang kekecewaan dan telah juga mencapai keputusan yang betul. Tiada kesilapan pada dapatannya bahawa kontrak di sini tidak dikecewakan.

[3a] Jikapun kami silap atas isu ini, faktanya masih lagi bahawa kekecewaan, sekiranya wujud, adalah dirangsangi oleh perayu sendiri. Berdasarkan fakta, tiada langsung peristiwa mencelah yang berlaku. Perayu enggan mematuhi panduan yang dikeluarkan oleh Bank Negara Malaysia berkaitan pinjaman kepada sektor hartanah dan dalam keadaan sedemikian bank-bank tidak dapat memberikan pinjaman. Ini adalah keingkaran yang disengajakan oleh perayu.

[4] Tuntutan oleh sesuatu pihak untuk pelaksanaan spesifik yang dibuat bersekali dengan tuntutan untuk gantirugi kerana kemungkiran kontrak adalah sesuatu yang biasa. Dengan itu, tiada apa-apa ketidakkonsistenan pada tindakan responden mengemukakan tuntutan pelaksanaan spesifik beserta dengan permohonan untuk gantirugi kerana kemungkiran kontrak sebagai ganti pelaksanaan spesifik.

[5] Hakim bicara betul apabila mengawardkan gantirugi jumlah tertentu di bawah fasal 10.1 perjanjian. Perayu tidak membuktikan bahawa perenggan tersebut adalah suatu fasal penalti, atau bahawa gantirugi jumlah tertentu yang dipersetujui itu adalah sesuatu yang melampaui batas, terlalu tinggi ataupun tidak berperikemanusiaan dalam hubungan dengan kerugian yang mungkin ditanggungi. Apapun, formula gantirugi seperti yang tertera di fasal 10.1 telah dirundingi secara bebas dan dipersetujui oleh pihak-pihak.

Case(s) referred to:

Ardeshir v. Flora Sassoon [1928] AIR 208 ***(dist)***

Beihai Zingong Property Development Co & Anor v. Ng Choon Meng [1999] 3 SLR 283 ***(refd)***

Chai Yen v. Bank of America National Trust & Savings Association [1980] 2 MLJ 142 ***(refd)***

Dato' Yap Peng & Ors v. Public Bank Bhd & Ors [1997] 4 CLJ 115 CA ***(refd)***

Davis Contractors Ltd v. Fareham UDC [1956] AC 696 ***(refd)***

Esley v. JG Collins Insurance Agencies Ltd [1978] 83 DLR (3d) 1 ***(refd)***

Esanda Finance Corporation Ltd v. Plessnig & Anor [1989] 84 ALR 99 ***(refd)***

Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd [2002] 1 CLJ 261 CA ***(dist)***

Lai Kok Kit v. MBf Finance Bhd [2000] 3 CLJ 213 CA ***(refd)***

Lam Soon Cannery Co v. Hooper & Co [1965] 2 MLJ 148 ***(refd)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(refd)***

Lee Seng Hock v. Fatimah Zain [1996] 4 CLJ 519 CA ***(refd)***

Maritime National Fish Ltd v. Ocean Trawlers Ltd [1935] AC 524 ***(refd)***

Neylon v. Dickens [1987] 1 NZLR 402 ***(foll)***

Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd [2000] 1 CLJ 346 CA ***(refd)***

Ramli Zakaria & Ors v. Government of Malaysia [1982] CLJ 158; [1982] CLJ (Rep) 719 (HC) ***(refd)***

Satyabrata Ghose v. Mugneeram Bangur & Co AIR [1954] SC 44 ***(refd)***

Souster v. Epsom Plumbing Contractors Ltd [1974] 2 NZLR 515 ***(refd)***

Tan Meng San v. Lim Kim Swee [1962] 28 MLJ 174 ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Zaibun SA Syed Ahmad v. Loh Koon Moy & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss. 15, 16

Contracts Act 1950, ss. 57(2), 75

Courts of Judicature Act 1964, s. 69(3)

Rules of the Court of Appeal 1994, r. 7(3A)

Other source(s) referred to:

Supreme Court Practice 1997, vol 1, p 1004

For the appellant - KS Narayanan (Joginder Singh, CT Annathurai, Logan Sabapathy, A Vishnu Kumar & Tharminder Singh with him); M/s Logan Sabapathy & Co

For the respondent - VK Lingam (VK Lakshmi with him); M/s VK Lingam & Co

[Editor's note: Concurring judgment of Tengku Baharudin Shah JCA at p 301]*

Reported by WA Sharif

JUDGMENT

Abdul Kadir Sulaiman JCA:

Maxisegar Sdn Bhd, the appellant, had appealed against the entire judgment of the High Court given on 7 March 2001. We had on 5 May 2005 dismissed the appellant's appeal with costs. We now give our reasons for doing so. Before that, we will deal with the appellant's motion in the appeal, to adduce fresh evidence which was not then before the learned judge.

We had on 24 February 2004 dismissed the appellant's notice of motion to adduce fresh evidence at the hearing of this appeal. The appellant had in this notice of motion sought leave of this court to admit the respondent's Directors' Report and Audited Accounts for the years 1997 and 1998 extracted from the Registry of Companies (Company Accounts) as further evidence at the hearing of this appeal proper.

We had after hearing the appellant's counsel dismissed the notice of motion with costs. We did not call upon the respondent's counsel to respond as we formed the view that the appellant's application to adduce fresh evidence did not meet the prerequisite conditions. We now give our reasons for the dismissal.

The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s. 69(3) of the Courts of Judicature Act 1964 and r. 7(3A) of the Rules of the Court of Appeal 1994. "The special grounds only" referred to in s. 69(3) of the Courts of Judicature Act and the tests set out in r. 7(3A) of the Rules of the Court of Appeal 1994 are generally known as the *Ladd v. Marshall* conditions. It is settled by various decided cases that the three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted. The said three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v. Hooper & Co* [1965] 2 MLJ 148 at p. 148 as follows:

> It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v. Marshall*:
>
> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on

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> the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> I pause to observe that these conditions are not alternative; they are cumulative.

b See also the judgment of Suffian FJ in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 at 71 and *Chai Yen v. Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 at 143.

In the present case before us, we found that the appellant's supporting affidavits did not explain fully why the evidence could not have been made
c available in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial there. This requirement is clearly stated in the *English Supreme Court Practice 1997*, vol. 1 at p. 1004 as follows:

d

> 59/10/14 Mode of application for leave to adduce further evidence ...
>
> ... The application must be supported by an affidavit deposing to the facts relied upon in support of the application. In particular the affidavit should explain fully why the evidence was not called in the court below, and where the *Ladd v. Marshall* criteria apply, why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial ...

e

We found that the appellant's supporting affidavits did not state these relevant facts in order to fulfill the requirements for the admission of the so-called fresh evidence before us.

f The appellant had also failed to satisfy the first test. As admitted by the appellant in para. 16 of the affidavit of Gan Ee Chin affirmed on 13 March 2002, the Company Accounts were available as a public document in the Registry of Companies then. The Company Accounts were clearly in the public domain. They were not hidden away by the respondent or for that matter by
g any other party but for the reason that it was not so made available by the appellant. This evidence could have been made available during the trial if due diligence was taken. If the appellant had conducted a simple search at the Registry of Companies the said Company Accounts could have been easily obtained for use at the trial. This the appellant had failed to do. The various reliefs claimed by the respondent in its pleadings were also plain and clear.
h In our judgment, the appellant could not have been misled by the respondent's pleadings and claims. It was therefore the duty of the appellant to bring forward its whole case at once in the trial and not to bring them forward as and when it thought appropriate to do so. To a question from the court, counsel for the appellant admitted that they had missed it at the trial.

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In our judgment, had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of this appeal could have been obtained during the trial of this action in the court below. We therefore found that there was no merit in the appellant's application before us to adduce the fresh evidence and we had accordingly dismissed the application with costs.

We now come to deal with the appeal proper and state the brief facts. The appellant, Maxisegar Sdn Bhd, is a housing and/or property developer. The respondent, Silver Concept Sdn Bhd, is a landowner. The parties entered into a sale and purchase agreement on 31 March 1997 whereby the respondent agreed to sell 1142.48 acres of land and the appellant agreed to purchase the said land for a total purchase price of RM217,071,200 upon the terms and conditions contained in the agreement.

Prior to the signing of the sale and purchase agreement, the appellant paid an earnest deposit of RM4,000,000. Upon the execution of the agreement, the appellant paid a further deposit of RM17,707,120 making a total amount of RM21,707,120 representing 10% of the purchase price of the property. On 30 June 1997 the appellant paid a further sum of RM20,364,080 to the respondent's solicitors as stakeholders. By a High Court consent order dated 21 March 1998 this further sum of RM20,364,800 together with accrued interest thereon was paid by the respondent's solicitors into court. Thus it is to be noted that of the total purchase price of RM217,071,200 of the said land, the balance remaining to be paid by the appellant was RM175,000,000 by the extended completion date determined to be 31 December 1997 pursuant to cl. 4.2 of the agreement.

Then, by a letter dated 13 December 1997, the appellant informed the respondent that they had failed to obtain the loan to pay the balance of the purchase price. This was followed by a letter from the appellant's solicitors dated 22 December 1997 informing the respondent's solicitors of the same fact with the consequent that the appellant has been lawfully discharged from further performance of the agreement. The appellant also demanded the refund of all monies paid earlier under the agreement. The appellant solicitor's letter was in the following terms:

Bil Kami: CMY.245.Larut.416A.97.yk

Tarikh: 22.12.1997

Messrs Rajah Lau & Associates
Advocates & Solicitors
Suit 488, 4th floor,
Wisma Methodist
No 1, Lorong Hang Jebat
50150 Kuala Lumpur

Attn: Mr Eg Kaa Chee

Dear Sirs,

Re: Sale And Purchase Agreement Dated 31.3.97

Vendor : Silver Concept Sdn Bhd
Purchaser : Maxisegar Sdn Bhd

We refer to the above matter wherein we act for Messrs Maxisegar Sdn Bhd., the Purchaser and you act for Messrs Silver Concept Sdn Bhd, the Vendor.

We refer to the above matter, our client's letter dated 13.12.97 addressed to the Vendor and to our letters to you dated 15.12.1997 and 18.12.1997.

It was provided in the above Agreement that our clients would be obtaining a loan from their bankers and/or financiers to assist them in completing the purchase of the land from your clients.

In view of the:

1. financial turmoil that our country is going through presently;

2. the light liquidity position prevailing in the country; and

3. Bank Negara Malaysia issuing guidelines and/or circulars to all financial institutions in the country to curtail and/or discourage and/or prohibit lending to broad property sector, our clients through no fault of theirs have not been able to raise any loan from their bankers to pay for the balance of purchase price or substantial part thereof to complete the purchase of your clients' land.

In the premises our clients have been lawfully discharged from further performance of the above Agreement.

Our clients therefore require you and your clients to refund all monies that have been paid to you (and held by you as stakeholders) and to your clients by 4.00pm on Friday 26.12.1997, failing which our clients shall take such action against you and your clients as they may be advised in the circumstances of the case.

Yours faithfully,
cc. Clients

The respondent's solicitors responded by letter on 26 December 1997 which was as follows:

CMY.245.LARUT.416A.97

December 26,1997

EKC/9957/SC/SPA/97

Hamzah Abu Samah & Partners
Advocates & Solicitors
Suite 2101, Tingkat 21
Wisma Hamzah-Kwong Hing
No 1 Leboh Ampang
50100 Kuala Lumpur

Dear Sirs,

Re: Sale And Purchase Agreement Dated 31.3.97

Vendor : Silver Concept Sdn Bhd
Purchaser : Maxisegar Sdn Bhd

With reference to the above matter and our client's letter to your client dated 18.12.1997 and our letter to you dated 19.12.1997, we are instructed to state as follows:

(a) your claim that your client has been discharge from further performance of the above agreement is invalid;

(b) Your client is reminded to pay the balance of purchase price to us as stakeholders in accordance with clause 4.2 of the agreement failing which our client shall take the necessary action against your client to enforce their rights provided in the agreement and under the laws of Malaysia.

Yours faithfully,

Eg Kaa Chee
cc. Silver Concept Sdn Bhd
(Attn: Mr Ng/Mr Chua).

The appellant then commenced proceedings in the High Court below claiming various reliefs against the respondent. The appellant, *inter alia*, claimed for a declaration that the contract has been frustrated and consequently the appellant is discharged from its obligation to perform the contract. The appellant also sought refund of all monies paid under the contract.

The respondent filed a counter-claim and sought, *inter alia*, a declaration that the said contract has not been frustrated and claimed for an order of specific performance of the contract. The respondent also claimed compensation or damages in addition to the order of specific performance or alternatively, damages for breach of the contract in lieu of specific performance.

After a full trial the learned judge dismissed the appellant's claims with costs. He, however, did not make an order for specific performance as prayed for by the respondent for the reason that an order for specific performance may not be just in view of the appellant's inability to pay the balance of the purchase price. In lieu, he awarded the respondent damages under cl. 10.1 of the agreement and ordered the forfeiture of the deposit of RM21,707,120 and a further sum of equivalent to 11%pa on the third instalment of RM130,242,720 calculated from the due date ie, 30 September 1997 to the date of forfeiture ie, date of judgment which was on 7 March 2001 by way of agreed liquidated damages, in favour of the respondent. The High Court judgment was reported in [2001] 6 MLJ 762.

The appellant had in their memorandum of appeal and submissions before this court attacked the trial judge's decision on several grounds. We find that the grounds that merit our consideration are the issues of frustration of the contract, the issue of the respondent's claims in the pleadings and the agreed liquidated damages under cl. 10.1 of the agreement.

(a) The Issue Of Frustration

We now deal with the issue of frustration. The appellant's counsel submitted that the obtaining of a loan from financial institutions by the appellant to pay a substantial portion of the purchase price was clearly known and in the contemplation of the parties as noted from the terms of the agreement. He submitted that the failure of the appellant to obtain a loan to pay the balance of the purchase price due to the liquidity problem and Bank Negara ruling on lending to the broad property sector was a supervening event beyond the control of the appellant and as a result the agreement became frustrated and void pursuant to s. 57 of the Contracts Act read with ss. 15 and 16 of the Civil Law Act.

The trial judge had admirably dealt with the issue of frustration and concluded that the contract was not frustrated on account of the respondent's failure to obtain a loan to pay the balance of the purchase price. This is what the trial judge said in his judgment (appeal record pp. 32 to 37):

> Findings:
>
> From the evidence adduced before the court during the trial, it is clear that the plaintiff intended to get a loan in order to pay off the balance sum. But unfortunately for the plaintiff, the economic recession had set in at that material time. This together with BNM's circulars which were not in the plaintiff's favour, led to the plaintiff's inability to secure the requisite loan to enable it to complete the purchase of the land. In the case of *Universal Corp v. Five Ways Properties Ltd* [1979] 1 All ER 552, the CA in referring to the doctrine of frustration said at p 554 as follows:

The judge dealt with the topic of frustration quite shortly. He said:

> But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.
>
> That seems to me to be an accurate and proper statement ...

However, there is no provision in the Agreement to say that the Agreement is conditional upon the Plaintiff getting a loan in order to perform its obligation under the agreement. The defendant on the other hand is ready, willing and able to perform its part of the Agreement. The Court can only construe the terms of the Agreement as contained in the Agreement. The Court cannot put in terms which have not been agreed upon by the parties.

Hashim Yeop Sani CJ (Malaya) in the case of *Koh Siak Pao v. Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 at page 168 said:

> Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it.

When the plaintiff entered into this Agreement, it took the risk of hoping to get a loan. When it failed to get the said loan then it would have to bear the consequences of the risk. In the case of *Amalgamated Investment & Property Co Ltd v. John Walker & Sons Ltd* [1977] 1 WLR 164, Buckley LJ at p 173 stated:

> But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

The land is still available, for the Plaintiff. The First Defendant is still ready and able to sell it to the Plaintiff. It is the Plaintiff's misfortune that it could not get the loan it hoped for. In *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257, the Supreme Court held at p 262 as follows:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

For the above reasons, it cannot be said that that the contract has been frustrated. As such, the plaintiff action is dismissed with costs.

As to the First Defendant's counterclaim, an order for specific performance may not be just in view of the Plaintiff's inability to pay the balance.

Regarding damages for breach of the agreement:

> Clause 10.1 of the Agreement provides that in the event of any breach by the Purchaser of any provisions of the Agreement, the Vendor, that is, the First Defendant shall be entitled to:
>
> (1) forfeit the first instalment; and
>
> (2) the sum equivalent to 11% pa on the third instalment or portion thereof remaining unpaid/outstanding, calculated from the due date until the date of forfeiture by way of agreed liquidated damages.
>
> Under the agreement:
>
> The first instalment paid was RM21,707,120
>
> The third instalment due was RM130,242,720
>
> I would therefore allow the First Defendant's claim for breach of contract by the Plaintiff for the forfeiture of the first instalment and a further sum equivalent to 11% pa on the third instalment of RM130,242,720.00 calculated from the due date 30.9.1997 until the date of such forfeiture, that is today. This amount can be utilised from the stakeholders sum plus interest (of RM21,954,318.45) which was paid into Court by way of set off and the amount deposited in Court together with all interest therein be released to the First Defendant.

In our judgment the learned trial judge had correctly guided himself on the law of frustration and came to a correct finding. We find no error in his finding that the contract in this case was not frustrated and we affirm his decision.

The appellant's counsel urged upon us to review the law of frustration in light of the Indian case of *Satyabrata Ghose v. Mugneeram Bangur & Co* AIR [1954] SC 44 and include the word "impracticability" to s. 57(2) of the Contracts Act. We cannot agree because the section is clear. It refers to two situations wherein a contract can become void, and therefore frustrated. The correct interpretation of the section has been given by our Federal Court in *Ramli bin Zakaria and Ors v. Government of Malaysia* [1982] CLJ 158; [1982] CLJ (Rep) 719 and our Court of Appeal in the cases of *Dato' Yap Peng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115, *Lee Seng Hock v. Fatimah bte Zain* [1996] 4 CLJ 519, *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 and *Lai Kok Kit @ Sulaiman Lai bin*

Abdullah v. MBf Finance Bhd [2000] 3 CLJ 213. In interpreting s. 57(2) of the Contracts Act, our courts have adopted the test formulated by the House of Lords in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696.

We wholly agree with the trial judge's finding that in this case, in the circumstances it happened, the contract is not frustrated. Even if we are wrong on this issue we find that on the facts of this case the frustration of the contract, if any, was self-induced by the appellant. When Arab-Malaysian Merchant Bank Berhad agreed by letter of 23 April 1997 to arrange for the requisite financing facility for the appellant to complete the purchase of the land there was a Special Condition incorporated therein in the following terms:

> The Borrower shall undertake that the development it intends to carry out on the Land shall comprise residential units priced at RM150,000 and below, industrial units and other units acceptable to AMMB to comply with Bank Negara Malaysia's prevailing guidelines on lending to the property sector.

The appellant's witnesses, SP2 and SP3 had given evidence at the trial that this Special Condition imposed by the bank was accepted by the appellant and the appellant had agreed to comply with them.

The bank's subsequent letter to the appellant dated 28 May 1997 also contained the above Special Condition under item (1) of the Conditions of Approval. Under condition (8) of the Additional Conditions Precedent to Drawdown, it was stated that:

> The Project Land has been approved by the relevant authorities for mixed development which shall comprise of 40% industrial and 60% residential development.

However, the appellant subsequently requested the bank to exclude the above two crucial conditions. The bank had in a letter to the appellant dated 27 July 1997 agreed to exclude the above two crucial conditions and put the appellant on notice that with these exclusions, the bank will not be able to participate as a Lender in the syndication for the loan, and that with these changes the number of financial institutions which could participate in the loan syndication would be significantly reduced. The bank, however, would continue to maintain its role as arranger and manager for the syndication on a best-effort arrangement basis. The bank called for the acceptance by the appellant of the new arrangement to which the appellant duly accepted.

The bank subsequently notified the appellant by letter dated 3 December 1997 that it was unable to conclude the syndication of the loan due to unfavorable response from potential lenders. The letter also stated that most of the financial institutions had cited liquidity as the main problem coupled with Bank Negara

Malaysia's ruling on lending to the broad property sector. In view of the above, the bank informed the appellant that it was unable to conclude the syndication and asked the appellant to arrange for other alternatives with respect to the purchase of the said land from the respondent.

We have carefully scrutinised the appeal record and we find that on the facts and circumstances of this case there was no supervening event at all. The appellant had refused to comply with the Bank Negara guidelines on lending to the property sector and in the circumstances the banks were unable to grant the loan. This was a deliberate act of non-compliance by the appellant. We hasten to add that on the factual matrix of this case there was no frustration at all. It was a self-induced frustration, if at all to be called frustration. In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 Court of Appeal held that:

> Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See *Dato' Yap Peng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115.

In *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524 the Privy Council held at 530 that:

> The essence of "frustration" is that it should not be due to the act or election of the party.
>
> ...
>
> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party to treat the contract as repudiated.

Another ground advanced by the appellant is that the respondent cannot maintain an action for breach of contract when its principal claim for specific performance was not granted by the trial judge. The appellant's counsel submitted that such inconsistent causes of action cannot be maintained because the claim for specific performance is on the basis that the agreement is afoot whereas the claim for damages for breach of agreement or damages for breach of undertaking is on the basis that the agreement is not afoot. He relied on the cases of *Ardeshir v. Flora Sassoon* [1928] AIR 208 PC, *Hipgrave v. Case* [1885] 28 Ch. D 356, *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* [2000] 1 CLJ 261 to substantiate his argument on this point.

In response the respondent's counsel submitted that this issue was not pleaded nor was it argued in the court below. He submitted that there is no inconsistency in the respondent maintaining a claim for specific performance of the contract and also seeking damages for breach of contract in lieu of specific performance and he cited several authorities to support his submission. He also distinguished the cases cited by the appellant and submitted that the appellant's submission on this issue is completely misconceived in law and suffers from a serious fallacy.

We find that this ground was not raised by the appellant in the court below. As this is a question of law we will deal with it. We have carefully studied the cases cited by the appellant's counsel and we find that the principles expounded in those cases are not applicable to this appeal. In the case of *Ardeshire v. Flora Sassoon, supra*, the plaintiff had abandoned his claim for specific performance nine months before the trial. In *Hipgrave v. Case, supra*, the plaintiff had abandoned his claim for specific performance at the trial. In *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* the respondent decided to abandon the prayer for specific performance at the hearing in chambers. We find that in this appeal the respondent had all along maintained its claim for specific performance right up to the conclusion of the trial and had never abandoned it. The respondent was at all material times ready, able and willing to carry out and perform its entire obligations under the agreement. The question of abandonment is very important and was clearly emphasised by the court of appeal in the case of *Tan Meng San v. Lim Kim Swee* [1962] 28 MLJ 174 at 178 as follows:

> There is a wide distinction between the present case and the case of *Ardeshire H. Mama v. Flora Sassoon* which was cited by Mr. Hills. In that case the suit was in its inception an action for specific performance of a contract for the sale of land with claims for damages in addition or in the alternative. The claim for specific performance was later abandoned by the plaintiff who at the trial claimed damages for breach of contract. In the Judicial Committee their Lordships (per Lord Blanesburgh) discussed at some length the history of the equitable relief of specific performance, and considered the effect of section 19 of the Indian Specific Relief Act (section 18 of our Ordinance) in the light of decisions on section 2 of Lord Cairns' Act. The conclusion at which their Lordships arrived was that where a claim for specific performance of a contract is joined with a claim for damages for breach of the contract and the claim for specific performance is abandoned, there is no power in the Court to award damages without an "apt and sufficient amendment of the plaint". The position in the present case is, however, quite different, for here the respondent has never expressly abandoned his claim for specific performance and his election to sue on a severable part of the contract, as he did in Civil Suit No. 51 of 1959, does not in the circumstances amount to an implied abandonment of that claim.

In the trial below the respondent had throughout maintained the claim for specific performance. It was reinforced in their written submission before the court (appeal record pp. 298 to 307). At the end of the trial it was the court that decided not to grant the respondent an order of specific performance of the agreement. A party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract is a perfectly usual claim. The Privy Council had held in the case of *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ 457; [1982] CLJ (Rep) 58 as follows:

> The action was on its face a normal one for specific performance requiring the vendor (present appellant) to transfer the land to the purchaser in fact Loh Koon Moy, Lam Wai Kee having acted on her behalf. The claim for relief was for specific performance of the agreement and further or alternatively damages for breach of contract – a perfectly usual claim which cannot be taken as indicating an alternative equally acceptable to the plaintiff ...
>
> The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion.

We therefore hold that there is no inconsistency in the respondent maintaining a claim for specific performance and also seeking damages for breach of the contract in lieu of specific performance. This is fortified by the case of *Souster v. Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at p. 521 in the following passage:

> Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead). The logic in the judgment of Scholl J would be hard to refute, for if the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the Court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the Court, the contract remains on foot.

We agree with the respondent's submission that particularly in the area of contracts for the sale of land a party in a suit must put forward all its claims in one and the same cause of action. We adopt the following passage in the case of *Neylon v. Dickens* [1987] 1 NZLR 402 at 409 and 410:

In the particular field of contracts for the sale of land this Court held as long ago as 1902 in *Dillon v. Macdonald* 21 NZLR 375, 393, that every remedy that can be claimed in respect of the same cause of action must, under New Zealand procedure, be claimed in the one action. And that as the plaintiff there could have made in the former action (an action for specific performance dismissed for unreasonable delay) her alternative claim (a claim to common law damages for breach of the same contract) she could not by dint of having limited her prayer for relief in the first action take a second proceeding claiming another remedy on the same cause of action.

Whether the present is strictly a case of merger arising from *res judicata* (as Hardie Boys J thought), or estoppel per *rem judicatam*, or simple abuse of procedure, it is unnecessary to debate. In our opinion it is plain that the delay-in-settlement claims for damages arise on the same cause of action as led to the decree for specific performance.

The purchasers should have put forward all their claims on that cause of action timeously, under the supplementary jurisdiction if need be, in the first action. They failed to do so and must accept the consequences.

(b) The Award Of Agreed Liquidated Damages Under Clause 10.1 Of The Agreement

The trial judge had in his judgment held that the appellant was in breach of contract and awarded damages pursuant to clause 10.1 of the agreement. We now reproduce clause 10.1 of the agreement which is in the following terms:

Default By The Purchaser

10.1 In the event of any breach by the Purchaser of any of the provisions of this Agreement the Vendor shall (subject to and after the expiry of a notice in writing to the Purchaser requiring the Purchaser to remedy such breach(es) within thirty (30) days from the date thereof provided always that such notice is only necessary if the breach(es) does/do not involve the payment of the 2nd Instalment or the 3rd Instalment) be entitled to forfeit the 1st Instalment and the sum equivalent to eleven per centum (11%) per annum on the 3rd Instalment or portion thereof remaining unpaid/outstanding calculated from the due date until the date of such forfeiture by way of agreed liquidated damages and the Vendor's solicitors shall refund to the Purchaser all other monies paid by the Purchaser towards the purchase of the Land (free of interest) in exchange for the Titles whereupon this Agreement shall terminate and cease to be of any further effect but without prejudice to any right which either party may be entitled to against the other party in respect of any antecedent breach of this Agreement.

It is trite law that an appellate court would be justified in interfering by reassessing the damages where the judge below had acted on a wrong principle or has made an entirely erroneous estimate of the damages and not otherwise. In the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p. 799 Tan Sri Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court held as follows:

> We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate court would be justified in interfering by assessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v. Lovell* [1935] 1 KB 354 at p 360. He said:
>
> ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.
>
> In other words the two situations in which an appellate court would be justified in interfering by reassessment of the damages would be where the trial judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.

The appellant had not demonstrated to us that the trial judge had indeed acted on a wrong principle or had made an entirely erroneous estimate of the damages. In our judgment the trial judge had correctly awarded the agreed liquidated damages under clause 10.1 of the agreement. There is, therefore, no valid reason to call for our appellate intervention.

We now consider whether the amount of damages under clause 10.1 of the agreement is a penalty. We did not hear serious arguments from the appellant's counsel on this point. It is now established that a party who attacks a liquidated damages clause as a penalty is in fact asking the court to relieve him from his contractual obligations which he had freely undertaken in exchange for good consideration. The courts would therefore generally preserve the sanctity of the contract freely entered into by the parties. (See the case of *Beihai Zingong Property Development Co & Anor v. Ng Choon Meng* [1999] 3 SLR 283 at 286 and 287).

In *Esley v. JG Collins Insurance Agencies Ltd* [1978] 83 DLR (3d) 1 at p. 15 the Supreme Court of Canada held that:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

The High Court of Australia had held in *Esanda Finance Corporation Ltd v. Plessnig & Anor* [1989] 84 ALR 99 that an agreed sum is a penalty if it is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered.

In the case of *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 the appellant forfeited 10% of the purchase price and was awarded interest at 13% per annum on the balance purchase price and was also awarded interest at 19% per annum on the outstanding instalments. The court of appeal overruled the trial judge's finding that the extra 13% interest imposed by the appellant was caught by s. 75 of the Contracts Act 1950. Her Ladyship Dato' Siti Norma Yaakob JCA (as she then was) held at pp. 357, 358 as follows:

> As for items (ii) and (iii) the principal objection raised is on the rates of interest chargeable as being excessive and a penalty under s. 75 of the Contracts Act 1950.
>
> ...
>
> As no part of the balance of the purchase price had been paid at all by the respondent, I cannot see how it can object to the imposition of 13% interest as that was the rate of interest agreed upon default under para (b) of the second schedule. Likewise the imposition of 19% interest on the arrears of instalments as that rate of interest is allowed by s 5.16 of the agreement. Perhaps the only issue is whether the increased interest at 19% pa is caught by s. 75 of the Contracts Act 1950.
>
> To bring that increased or penalty interest within the ambit of s. 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% pa on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest cannot be caught by s. 75.

> I am aware that the 'Explanation' to s. 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the 'Explanation' is not mandatory in nature as the Legislature preferred the word 'may' as opposed to 'shall'. Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the 'Explanation' in s. 75.

In this appeal before us now, the appellant has failed to demonstrate to us that the agreed liquidated damages in clause 10.1 of the agreement is extravagant, exorbitant or unconscionable in relation to the loss likely to be suffered and is therefore a penalty clause. We had earlier pointed out that this agreement was drafted by the parties with the benefit of legal advice and the appellant and the respondent had both freely bargained and agreed upon to the formula of damages stipulated in clause 10.1 of the agreement as agreed liquidated damages. We therefore hold the agreed liquidated damages provision in clause 10.1 of the agreement is not a penalty clause. We would preserve the sanctity of the contract freely entered into by the parties.

The judgment under appeal before us now does not contain any misdirection or errors that warrants our appellate interference. In fact after carefully scrutinizing the appeal record and having heard the rival submissions of the parties' counsel we are fully satisfied that the trial judge below had properly guided himself on the relevant law and principles applicable and had come to correct findings of fact on the issues before him. We therefore dismiss the appellant's appeal with costs. We affirm the decision of the High Court.

We extend our appreciation to both counsel for the appellant and the respondent for their well researched submissions and presentation which has made our decision very much easier.

My learned brothers Tengku Dato' Baharudin Shah bin Tengku Mahmud JCA and Dato' Azmel bin Haji Maamor J have read the draft judgment and concur with it.